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U.S. Supreme Court
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

588

No.

MASSACHUSETTS BONDING AND INSURANCE
COMPANY,

Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST
COMPANY OF DAYTON, OHIO, as Administrator of
the bonis non with will annexed of the Estate of Robert
Chambers, Deceased,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS
TO THE UNITED STATES SUPREME COURT
OF APPEALS WITH CERTIORARI
AND WRIT IN SUPPORT THEREOF.

CLEVELAND E. CHAMBERS,

Chief Counsel, Dayton, Ohio.

A. E. HARRIS,

Clerk of the Court, Dayton, Ohio.

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THE WINTERS NATIONAL BANK AND TRUST
COMPANY OF DAYTON, OHIO, as Administrator de
bonis non with will annexed of the Estate of Robert
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Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS, SIXTH CIRCUIT**

*To the Honorable the Chief Justices and Associate Justices
of the Supreme Court of the United States:*

Comes now, The Massachusetts Bonding & Insurance Company, your petitioner herein, and respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals, Sixth Circuit, in the above captioned case.

OPINION BELOW

The opinion, of the Court below, is reported in Massachusetts Bonding & Insurance Co. vs. The Winters National Bank & Trust Company of Dayton, Ohio, 130 Fed. (2d), Page 5. (Federal Reporter, Oct. 5, 1942.)

JURISDICTION

The judgment of the Court below was entered October 6, 1942. The jurisdiction of this Court is invoked under Section 28, U. S. C. A. Sec. 347.

SUMMARY STATEMENT OF MATTER INVOLVED

The controversy arises out of an action against the petitioner, as surety on an Administrator's bond, brought by the respondent, as the successor Administrator, and involves the method of determining the surety's liability.

In 1936, Daniel I. Harshman, Administrator De Bonis Non, W.W.A., of the Estate of Robert Chambers, Deceased, admitted that he had made personal use of the Estate's moneys and was short in his accounts, and then died by his own hand. Thereafter, your respondent was appointed his successor and caused to be filed, on his behalf, a tenth and final accounting. Respondent then commenced a special or ancillary proceeding, under the Ohio law, by filing exceptions to the tenth and final account of the deceased Administrator, to cause inquiry to determine the amount of the loss by the Probate Court. These proceedings were terminated by the Probate Court of Montgomery County, Ohio, on December 1, 1939, wherein it rendered judgment against Daniel I. Harshman, Deceased, or his estate, and determined the amount that he had actually embezzled in the sum of \$17,717.00, and in addition thereto, ordered that Mr. Harshman, or his estate, pay damages as interest on the withdrawals, and return previously allowed compensation, in the sum of \$13,000.00. (R-149)

The surety, thereupon, commenced an action in the United States District Court praying for a declaratory judgment to determine its liability, if any, and the extent.

(R-1) Subsequently the respondent filed its action in the Common Pleas Court of Montgomery County, Ohio, based upon the judgment obtained in the Probate Court against Mr. Harshman and his estate, in the sum of \$30,372.58, and endeavored to collect from your petitioner, the actual loss of \$17,717.00, and in addition thereto, the penalties assessed against the deceased Mr. Harshman and his estate, of about \$13,000.00. (R-22) This later action was removed to the Federal District Court on the ground of diversity of citizenship, and consolidated by agreement with the declaratory judgment action. (R-29)

At the trial the surety, your petitioner, contended that the action, on the judgment of the Probate Court, was improperly laid, since it was necessary to maintain it as a cause of action arising out of its surety contract or bond, and that a breach of the bond must be proven, together with the resulting loss of the actual amount embezzled. Further, that the \$13,000.00 item, representing damages allowed by the Probate Court, was a separate issue to be determined as to whether or not the bond or contract of the surety extended to cover these penalties.

It was urged by the respondent that the doctrine of res judicata applied, by reason of the fact that the surety had been compelled to defend and did defend the proceeding on exceptions in the Probate Court, to determine the amount of the actual shortage, and, in view thereof, it was not necessary to bring the action on the bond, as above set forth, but merely to allege and prove the rendition of the judgment by the Probate Court against Mr. Harshman or his estate, in the total sum of \$30,372.58, without pleading or presenting evidence of a breach of the bond, any actual loss, and additional damages by way of penalty.

Both the Federal Trial Court and the Circuit Court of Appeals agreed with the theory of the respondent, and the Judgment was rendered and affirmed in the lump sum, including the penalty, without requiring the respondent to prove a case as by a breach of the bond, and without permitting the surety to defend to determine if the penalty of about \$13,000.00 was covered by its contract or recoverable under the law.

QUESTIONS PRESENTED

(1) Will the doctrine of *res judicata* deprive the surety of its defenses to litigate on its bond, in a second action between the same parties, when the latter action is on a different claim or demand, or cause of action?

(2) Is a prior judgment *res judicata* to a litigant when that judgment was not rendered upon the merits or the issues propounded in the second action?

(3) In such respect (2 above), the Court below is in direct conflict with the Circuit Court of Appeals, Eighth Circuit, in *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41; *Harrison v. Remington Paper Co.*, 140 Fed. 385; the Fifth Circuit Court of Appeals in *Kelliher v. Stone and Webster*, 75 Fed. (2d.)—331; and the Fourth Circuit Court of Appeals in *Bitner v. West Virginia Pittsburgh Coal Co.*, 15 Fed. (2d.) 652.

(4) The United States Circuit Court of Appeals below, did not follow the decision of this Honorable Court in *West v. Am. Tel. & Tel. Co.*, 311 U. S. 223, when it approved the law as pronounced by an Ohio Appellate Court which was contrary to the statutes and decisions of the Supreme Court of Ohio.

(5) Must respondent, to successfully maintain an action on the bond of the surety, allege and prove facts that

constitute a breach of the bond, together with the resulting loss to the obligee occasioned by each breach? The District Trial Court found in the affirmative on this point as propounded by your petitioner. The Circuit Court of Appeals, below, however, finds, in effect, in the negative.

(6) The Circuit Court below found that "The determination of the liability of the Administrator", is "a prerequisite to this suit on the bond." (R. page 366) Yet, it affirmed the decision of the District Trial Court which found to the direct contrary and which held that the failure of the deceased Administrator or his Estate to pay a judgment rendered against him, in a proceeding commenced against him after his death, constituted a breach of the bond.

SPECIFICATION OF ERRORS TO BE URGED

It is submitted by your petitioner that the foregoing questions to be presented disclosed errors of the Court below prejudicially harmful to your petitioner in the following respects, to-wit:

(1) The Circuit Court below erroneously held that the controversy which arose in the nature of the ancillary or special proceedings as exceptions filed to the tenth and final account of the deceased Administrator to inquire into the amount of a shortage of such fiduciary, involved the same claim, demand or cause of action as presented in the action below on the bond to determine the liability of your petitioner as surety.

While the exceptions of the respondent, in the Probate Court, sought to determine the amount Mr. Harshman owed the estate, it also included a prayer for a judgment against your petitioner on its bond. This latter issue was not tried to the State Courts or submitted, and no judg-

ment against the surety rendered thereon in those proceedings. The only issue actually determined was that Mr. Harshman had embezzled \$17,717.00, and the judgment determined and added a penalty of \$13,000.00 for his personal use of such funds.

Since the second action must be upon the bond to determine the surety's liability with respect to the actual shortage of \$17,717.00, and its liability, if any, for the penalties assessed, it is upon a different claim or demand and cause of action, and the first judgment will not operate as an estoppel in such respect. (Authorities cited in brief, page 16).

(2) The Court below, in holding that where different proof is required to sustain the state action on the exceptions and the one at bar, a judgment in the state action is a bar or estoppel to the latter action is in direct conflict with the Circuit Court of Appeals for the Fourth, Fifth and Eighth Circuits. (See No. 2, Questions Presented, *supra*), thereby permitting the respondent to maintain a suit on the judgment of the State Court, and thereby depriving the petitioner of the right to have an action brought upon the bond, for a breach thereof, and depriving it of its necessary defenses thereto.

(3) The Circuit Court below correctly held that the action on exceptions in the State Court was a determination of the liability of the Administrator, and was a prerequisite to the suit on the bond, yet did not reverse the decision of the District Trial Court, which held to the contrary, thereby enjoining your petitioner from having brought against it a proper suit on the bond for a breach thereof and enabling it to submit its defenses thereunder.

(4) This Court Reversed the Circuit Court below in *West v. Am. Tel. & Tel. Co.*, *supra*, and held that Federal Courts must accept as the Law of a State, the law as pronounced by the statutes or the highest

Court of that State. The Circuit Court below erroneously held that it was bound to accept the law as pronounced by the Court of Appeals in the state action, which nevertheless, was contrary to the provisions of the statutes and pronouncement of the Supreme Court of Ohio, on the same question, thereby depriving the petitioner of the right to have determined, in an action upon the bond, whether the issue with respect to the penalties claimed, in addition to the actual loss, as far as the surety was concerned, was made possible by a vacation of a judgment by the State Court in a manner provided by law of Ohio. (Authorities cited in Brief, P. 21).

(5) The District Trial Court correctly held that the petitioner as surety was entitled to require the respondent to allege and prove facts which constituted a breach of its bond, and submit evidence in proof of a loss occasioned by each breach but did not require it done. The Circuit Court of Appeals below erroneously held to the contrary. The respondent, therefore, was permitted to merely allege the judgment it obtained in the State Court, then claim that *res judicata* estopped the surety and, thereby, it was not required to prove the bond, its conditions, a breach and resulting loss by reason thereof. The penalties of \$13,000.00 were included in the lump sum of the judgment, and the surety deprived of offering a defense to any of such claims and penalties.

(6) The Court below erred in rendering judgment for the respondent.

REASONS FOR GRANTING THE WRIT

(1) That the surety be granted its day in Court.

(2) That it have its constitutional right to be properly sued on its bond for a breach thereof, and permitted to offer for judicial determination any and all defenses it may have.

(3) That it may be permitted to have tried to determine

if its principal's embezzlement of \$17,717.00 constituted a breach of the bond and if it was liable for such amount.

(4) That it may be permitted to have tried, on issues properly joined, to determine, whether or not the penalties of \$13,000.00, found against the dead fiduciary, were proper claims covered under the bond or had been barred by an Ohio Statute of Limitation.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings, herein; and that the judgments of the United States Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Southern District of Ohio, Western Division, be reversed and for such other and further relief as this Honorable Court may find just and proper.

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